

PATRICK DENNIS GLAVIN
Claimant

VS.

GFI, INC.

Respondent

AND

LIBERTY MUTUAL FIRE INS. CO.
Insurance Carrier

Docket No. 1,032,422

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, claimant announced that he was no longer disputing the ALJ's findings with respect to the unauthorized medical allowance. Thus, the only issue for purposes of this appeal is the nature and extent of claimant's impairment as a result of his work-related injury.

ISSUES

The ALJ adopted the opinions expressed by Dr. Bradley Storm and assigned claimant a 5 percent permanent partial impairment¹ to his right hand as a result of his work-related injury.² The claimant requests review this finding and urges the Board to modify the Award. Claimant contends the more credible evidence as to claimant's impairment came from Dr. Koprivica who rated claimant with 20 percent impairment to the right upper extremity and 10 percent impairment to the left upper extremity.

Respondent maintains the ALJ's Award should be affirmed in all respects as it contends claimant failed to prove that he suffered any injury beyond the triggering (right) ring finger during the period for which he claims injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

In 2002, claimant developed bilateral carpal tunnel and cubital tunnel conditions along with a left hand trigger finger, all which were treated as a work-related accident. All issues relating to those conditions were resolved in 2003 by settlement. After claimant's settlement he returned to work doing the very same job, which required him to repetitively place shirts onto a printing base for printing and drying. Over time, claimant began to notice triggering in his right middle (long) finger. He filed a claim for compensation alleging a series of injuries commencing April 2006 and continuing to August 27, 2007, claimant's last date of work.

Respondent was first sent to Dr. Frederico Gonzalez who then referred claimant to Dr. Bradley Storm, a board certified plastic surgeon. Dr. Storm first saw claimant in January 2006 and recommended surgery to release the tendon in the right middle finger. That surgery was accomplished in February 2006. Dr. Storm continued to treat claimant because he developed an infection in his hand following the surgery. Dr. Storm also noted problems in the right ring finger and even provided an injection in the ring finger. But claimant did not feel as though he benefitted from Dr. Storm's treatment.

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

² The ALJ also made a finding with respect to the unauthorized medical allowance, denying claimant's request for reimbursement of a physician's examination fee. That finding is no longer at issue in this appeal pursuant to counsel's representation at oral argument.

Claimant's care was then directed to Dr. Lynn Ketchum who recommended injections and another trigger finger release on his left hand. Claimant declined to follow through on the left hand procedure. Thereafter, claimant quit his job with respondent and later returned to work as a volleyball referee.

Claimant testified that before he quit work he was having difficulty opening and closing his hands, and was dropping things, including pens. He also noted problems sleeping through the night due to pain in his hands. He also complained of elbow soreness. Claimant acknowledges that he is an insulin-dependent diabetic and has been diagnosed with peripheral neuropathy based upon a 2007 EMG study.

Dr. Storm testified that claimant sustained a 5 percent permanent partial impairment to the right hand as a result of his trigger finger condition. According to Dr. Storm, claimant had no lasting problems with range of motion although there was some alteration of claimant's grip strength which he attributed to claimant's unwillingness to put forth a full effort. Moreover, he indicated that as a diabetic, claimant was particularly susceptible to carpal tunnel and cubital tunnel as well as post-operative infections, all of which claimant has experienced.

At his lawyer's request, claimant was examined by Dr. P. Brent Koprivica in August of 2008. Dr. Koprivica found that claimant was still experiencing soreness and aching in his right palm along with triggering in the right ring finger. Claimant also complained of aching and loss of strength in both hands, wrists and forearms. Dr. Koprivica assigned a 30 percent impairment to claimant's right upper extremity and 20 percent to the left upper extremity. These ratings included the entirety of claimant's ongoing complaints, the residuals from his surgeries as well as the loss of strength found in both extremities. He then testified that 10 percent should be deducted from each rating to account for claimant's earlier claim.

When asked, Dr. Koprivica acknowledged that the EMG studies performed in June of 2006 demonstrated residuals from the carpal tunnel and cubital tunnel releases that were encompassed by the earlier claim. He likewise acknowledged that the April 2007 EMG revealed peripheral polyneuropathy that was attributable to claimant's diabetes. Finally, he testified that if he was to rate only the trigger finger on the right, claimant's impairment rating would be 4 percent to the right hand.

Respondent retained Dr. Lanny Harris to examine and rate claimant for his injury. According to Dr. Harris, claimant did demonstrate a slightly abnormal flexion and extension in both his wrists, but he otherwise had full range of motion in his fingers and demonstrated good motor skills, normal sensations and a negative Phalens Test along with a faintly positive Tinels.³ Dr. Harris rated claimant's permanent impairment at zero percent as he

³ Harris Depo. at 7.

concluded that claimant's problems are all attributable to either his diabetic condition or to his earlier injuries. Indeed, the 2007 EMG confirms claimant's polyneuropathies due to diabetes and the diabetes makes claimant vulnerable to entrapment syndromes and trigger finger conditions. Dr. Harris agreed that if one were to rate the entire constellation of claimant's conditions and complaints, that he would qualify for a 30 percent of the right upper extremity and a 20 percent of the left.

After having reviewed this evidence the ALJ concluded as follows:

. . . the court finds that Dr. Storm's medical opinion best reflects the impairment sustained by [c]laimant for this series of injuries and adopts his opinion as its own.⁴

The ALJ went on to assign a 5 percent impairment to claimant's right hand for the injuries he sustained as a result of the series of accidents from 2006 up to the claimant's last date worked. She reasoned that "Dr. Storm's medical opinion is supported by the EMG studies performed in 2006 that demonstrated the residuals of the prior carpal and cubital tunnel releases as well as the studies performed in 2007 that demonstrated the diabetes associated peripheral polyneuropathy."⁵

The Board has considered the ALJ's findings and her reasoning and concludes the Award should be affirmed. The essence of claimant's argument in his brief and at oral argument is that claimant settled his bilateral carpal tunnel and cubital tunnel complaint in 2003 for far less than it was worth. And now he has gone on to work at that same job for a total of 13 years (including the period encompassed by his earlier claim) and should get more than the 5 percent awarded by the ALJ for *this* claim. The difficulty with claimant's argument is that neither the evidence nor the law supports that argument.

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Claimant alleges a series of injuries commencing in April 2006 and spanning to August 27, 2007, when claimant quit work. Respondent has admitted claimant sustained a compensable injury during this period of time. Claimant's initial complaints were to his right trigger finger. Although he later asserted that he had problems in his left hand as well

⁴ ALJ Award (June 9, 2009) at 5.

⁵ *Id.*

and then to both upper extremities, the evidence is clear that he suffers from diabetes, a condition that makes him vulnerable to entrapment neuropathies, which would generate such complaints. Moreover, he had those complaints dating back to 2002, and that claim has since been settled.

Dr. Koprivica rated claimant's entire litany of complaints and then deducted 10 percent from each upper extremity rating leaving claimant with a 20 percent impairment (to the right) and 10 percent impairment (to the left). But his testimony does not indicate that the totality of the remaining impairment is attributable to claimant's repetitive injuries from April 2006 to August 27, 2007 much less an aggravation of his underlying entrapment conditions. In fact, Dr. Koprivica concedes that the complaints voiced are those that one would expect if you had diabetes. The EMG completed in 2007 supports the finding that the diabetes has given rise to the peripheral neuropathies rather than his work activities.

Dr. Storm treated and rated claimant's right trigger finger at 5 percent. The ALJ adopted that impairment assessment as her own. The Board finds that conclusion is supported by the record. Claimant has failed to meet his evidentiary burden that the balance of his bilateral complaints are attributable to his repetitive work activities from April 2006 to August 27, 2007. Accordingly, the Award is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Marcia Yates Roberts dated June 9, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Stephanie Warmund, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge